BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BETTY J. PALMER	)	
Claimant	)	
VS.	)	
	)	Docket No. 242,111
LINDBERG HEAT TREATING	)	
Respondent	)	
AND	)	
	)	
INSURANCE COMPANY	)	
STATE OF PENNSYLVANIA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the November 20, 2000 Award entered by Administrative Law Judge John D. Clark. The Board heard oral argument on May 11, 2001, in Wichita, Kansas.

APPEARANCES

David H. Farris of Wichita, Kansas, appeared for claimant. Douglas C. Hobbs of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for a December 24, 1998 accident and any micro-traumas that claimant sustained after that date through her last day of work for respondent on March 18, 1999. On December 24, 1998, after leaving a supervisor's office where she had picked up her paycheck, claimant tripped over a large scale and fell. In the November 20, 2000 Award, Judge Clark determined that claimant injured both shoulders and her neck and granted claimant a 27.5 percent work disability (a disability greater than the functional impairment rating). In calculating the work disability, the Judge used a 41 percent wage

loss and a 14 percent task loss. The Judge also found that claimant sustained injury on December 24, 1998, and each and every working day through March 18, 1999, which was claimant's last day working for respondent.

Respondent and its insurance carrier contend Judge Clark erred. They argue that claimant's accident occurred while claimant was on a personal errand to pick up her paycheck and, therefore, the accident neither arose out of nor occurred in the course of employment. They admit the December 24, 1998 accident occurred on respondent's premises and that claimant injured her left shoulder. But they contest that claimant injured her right shoulder or neck. Finally, respondent and its insurance carrier argue that claimant's permanent disability benefits should be limited to the functional impairment rating for the left shoulder or, in the alternative, to a 16.9 percent work disability.

Conversely, claimant contends that the percentage of permanent partial general disability should be increased from 27.5 percent to either a 60 or 71 percent work disability, because claimant is unemployed and has a 100 percent wage loss.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident arising out of and in the course of employment with respondent?

2. If so, what is the nature and extent of injury and disability?

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. Claimant was scheduled to receive her paycheck before leaving work on December 23, 1998. But the checks did not arrive before claimant left work. Although the plant would be closed for the Christmas holiday, respondent arranged to distribute the checks on December 24, 1998, at 11:30 a.m. On the morning of December 24, 1998, claimant went to respondent's plant and picked up her paycheck. As claimant was leaving the plant, claimant tripped over a large scale, injuring herself.

2. The Board affirms the Judge's finding and conclusion that claimant injured her shoulders and neck as a direct consequence of the December 24, 1998 accident. According to Dr. Jane Drazek, who the Board finds credible and persuasive, claimant fractured the greater tuberosity of the humerus in the left shoulder when she fell. As a result of that injury, claimant required left shoulder rotator cuff repair. Later, claimant also developed chronic bilateral shoulder pain with impingement, which was a direct and natural result of the injuries sustained in the fall.

3. According to Dr. Drazek, claimant should avoid overhead use of the left upper extremity, avoid repetitive pushing and pulling with the left upper extremity, limit repetitive lifting with the left upper extremity to no greater than 10 to 15 pounds, and limit frequent lifting to no greater than 30 to 35 pounds. Because of the early impingement signs in the right shoulder, the doctor also believes that claimant should limit repetitive and resistive use of the right upper extremity. The doctor reviewed the list of claimant's former work tasks that was prepared by labor market expert Jerry Hardin and identified five of 36 former tasks (or approximately 14 percent) that claimant should no longer perform because of the injuries directly related to the December 1998 accident.

4. The Board agrees with the Judge that claimant sustained a 14 percent whole body functional impairment and a 14 percent task loss as a result of the injuries directly related to the December 1998 accident. Those findings are based upon Dr. Drazek's opinions of functional impairment and task loss, which the Board finds the most convincing.

5. Following the December 24, 1998 accident, claimant worked for respondent in an accommodated position through March 18, 1999. After recovering from the left rotator cuff surgery, claimant attempted to return to work for respondent but was advised that the company did not have a position for her. Claimant then worked part-time as a grocery checker at Dillons from January 12, 2000, through April 29, 2000, earning approximately $263.38 per week.[1] Claimant quit that job to work full-time as a motel clerk. But claimant was terminated from that job after working less than a week and was told that the job was too fast-paced for her.

6. At the time of the regular hearing, claimant was unemployed as she had been recently terminated from the motel clerk job. Claimant testified that she intended to apply for work at Dillons and other potential employers. The record does not disclose claimant's last day of work as a motel clerk, but it would have to be between claimant's last day with Dillons on April 29, 2000, and the May 4, 2000 regular hearing.

7. In their briefs, the parties agree that claimant's pre-injury wage was $452.22. Using that pre-injury wage, the Board finds the following differences in claimant's pre- and post-injury wages for the following periods:

> For the period from December 24, 1998, through claimant's last day of work on approximately March 18, 1999, claimant had no wage loss as she continued to work for respondent in an accommodated position using her right arm only.

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[1] Claimant was paid $4,100.89, or an average of $263.38 per week, while working for Dillons for approximately 15.57 weeks.

> For the period from March 19, 1999, through December 2, 1999, claimant was temporarily and totally disabled.
>
> For the period commencing December 3, 1999, claimant had a 100 percent wage loss, which continued until January 12, 2000, when she began working for Dillons.
>
> For the period from January 12, 2000, to the date of regular hearing on May 4, 2000, claimant had a 42 percent wage loss.
>
> For the period commencing May 4, 2000, claimant had a 100 percent wage loss as she became unemployed.[2]

8. The Board adopts the Judge's findings and conclusions set forth in the Award that are not inconsistent with the above.

CONCLUSIONS OF LAW

1. For the reasons below, the Award should be modified to grant claimant a 14 percent permanent partial general disability, followed by 37 weeks of temporary total disability, followed by a 57 percent work disability, followed by a 28 percent work disability, followed by a 57 percent work disability.

2. The accident is compensable under the Workers Compensation Act. The Act is to be liberally construed to bring both employers and employees within its provisions, affording both the Act's protections.[3]

3. Before an accidental injury is compensable under the Act, the accident must arise out of and occur in the course of employment.

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[4]

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[2] The Board uses May 4, 2000 to commence the 100 percent wage loss as that is the first date that claimant established that she was unemployed.

[3] *Chapman v. Beech Aircraft Corp.*, 258 Kan. 653, 907 P.2d 828 (1995).

[4] K.S.A. 1998 Supp. 44-501(a).

4. The Act does not define "arising out of and in the course of employment" other than to state what shall not be construed as satisfying the definition.

> The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include injuries to the employee occurring while the employee is on the way to assume the duties of employment or after leaving such duties, the proximate cause of which injury is not the employer's negligence. An employee shall not be construed as being on the way to assume the duties of employment or having left such duties at a time when the worker is on the premises of the employer or on the only available route to or from work which is a route involving a special risk or hazard and which is a route not used by the public except in dealings with the employer. . . .[5]

The Courts have provided additional guidance and have held that an accident "arises out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Accordingly, an injury arises out of employment if it arises out of the nature, conditions, obligations, or incidents of the employment.[6] Additionally, the phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the employee was at work in the employer's service.[7]

Moreover, the Kansas Supreme Court has held that once an employee reaches an employer's premises, the risks to the employee are causally connected to the employment. Therefore, an injury sustained on the premises is compensable even if the employee has not yet begun work. In *Thompson*, the Court, while analyzing what risks were causally related to a worker's employment, wrote:

> The rationale for the "going and coming" rule is that while on the way to or from work the employee is subjected only to the same risks or hazards as those to which the general public is subjected. Thus, those risks are not causally related to the employment. . . . However, **once the employee reaches the premises of the employer, the risks to which the employee is subjected have a causal connection to the employment, and an injury**

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[5] K.S.A. 1998 Supp. 44-508(f).

[6] *Newman v. Bennett*, 212 Kan. 562, 512 P.2d 497 (1973).

[7] *Newman*, *supra*.

> **sustained on the premises is compensable even if the employee has not yet begun work**. . . .[8] (Emphasis added.)

5. The Board concludes that claimant's accident arose out of and in the course of employment with respondent. Claimant was at respondent's plant at a designated time to pick up her paycheck, which was an activity that arose out of the nature, conditions, and incidents of claimant's employment. Considering the time, place, and circumstances surrounding the accident, the Board concludes that the accident occurred in the course of claimant's employment.

Moreover, the "going and coming" rule set forth in K.S.A. 1998 Supp. 44-508(f) requires the Board to conclude that claimant had not left her work duties at the time of the accident as she had not departed respondent's premises after picking up her check, which was an activity contemplated and causally related to the employment.

6. Because claimant's injuries comprise an "unscheduled" injury, the permanent partial general disability rating is determined by the formula set forth in K.S.A. 1998 Supp. 44-510e. That statute provides, in part:

> The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[9] and *Copeland*.[10] In *Foulk*, the Court of Appeals held that a worker could not avoid the presumption against a work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered and

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[8] *Thompson v. Law Offices of Alan Joseph*, 256 Kan. 36, 46, 883 P.2d 768 (1994).

[9] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[10] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

which paid a comparable wage. In *Copeland*, the Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wages should be based upon an ability to earn rather than actual wages when the worker fails to make a good faith effort to find appropriate employment after recovering from his or her injury.

> If a finding is made that a good faith effort has not been made, the factfinder [sic] will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[11]

7. The Board concludes that claimant made a good faith effort to find appropriate employment following her accident. When claimant could not return to work for respondent, she looked for employment and found part-time work with Dillons. Claimant then left Dillons for a full-time job believing it to be a better opportunity and less physically demanding. Although the motel clerk job only paid $6 per hour as compared to the $7.50 base rate at Dillons, the Board cannot conclude that it was bad faith for claimant to leave Dillons for the motel clerk position. Moreover, the parties may seek to review and modify the award when claimant obtains another job.

8. As claimant has established that she has made a good faith effort to find appropriate employment, the actual difference in her pre- and post-injury wages should be used. Applying the permanent partial general disability formula, claimant has the following percentages of disability for the following periods:

> For the period from December 24, 1998, through March 18, 1999, claimant has a 14 percent permanent partial general disability as it is limited to the functional impairment rating.
>
> For the period from March 19, 1999, through December 2, 1999, claimant was entitled to receive temporary total disability benefits.
>
> For the period from December 3, 1999, until January 12, 2000, claimant has a 57 percent (100 percent wage loss and 14 percent task loss) work disability.
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> For the period from January 12, 2000, until May 4, 2000, claimant has a 28 percent (42 percent wage loss and 14 percent task loss) work disability.
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> For the period commencing May 4, 2000, claimant has a 57 percent (100 percent wage loss and 14 percent task loss) work disability.

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[11] *Copeland*, p. 320.

AWARD

WHEREFORE, the Board modifies the November 20, 2000 Award as follows:

Betty J. Palmer is granted compensation from Lindberg Heat Treating and its insurance carrier for a December 24, 1998 accident and resulting disability. Based upon an average weekly wage of $452.22, Ms. Palmer is entitled to receive the following disability benefits:

For the period from December 24, 1998, through March 18, 1999, 12 weeks of benefits are due at $301.50 per week, or $3,618, for a 14 percent permanent partial general disability.

For the period from March 19, 1999, through December 2, 1999, 37 weeks of temporary total disability benefits are due at $301.50 per week, or $11,155.50.

For the period from December 3, 1999, through January 11, 2000, 5.71 weeks of benefits are due at $301.50 per week, or $1,721.57, for a 57 percent permanent partial general disability.

For the period from January 12, 2000, through May 3, 2000, 16.14 weeks of benefits are due at $301.50 per week, or $4,866.21, for a 28 percent permanent partial general disability.

For the period commencing May 4, 2000, 190.16 weeks of benefits are due at $301.50 per week, or $57,333.24, for a 57 percent permanent partial general disability and a total award of $78,694.52.

As of July 30, 2001, claimant is entitled to receive 37 weeks of temporary total disability compensation at $301.50 per week, or $11,155.50, plus 98.56 weeks of permanent partial general disability compensation at $301.50 per week, or $29,715.84, for a total due and owing of $40,871.34, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of $37,823.18 shall be paid at $301.50 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Wichita, KS
Douglas C. Hobbs, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director